



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 32 OF 2016

BETWEEN

JOSEPH SHISUNDI LIKHANGA.....APPELLANT

AND

FERDINAND LISUTSA SHIBUKU.....1ST RESPONDENT

MARY GORETI INGASO.....2ND RESPONDENT

(Being an appeal arising from the Judgment of the High Court of Kenya at Kakamega (Ruth N. Sitati, J.) delivered on 24th September, 2015

in

H.C. Succession Cause No. 562 of 2004)

RULING OF THE COURT

[1] The appellant is the son of *Clement Likhanga Shumila* who died on 8th November 1992 (deceased). He left two other surviving sons, *Nicholas Lichoti Likhanga (Nicholas)* and *Charles Mutsotso Likhanga*. The estate of the deceased comprises of one parcel of land *Isukha/Mukhonje/2* measuring 0.9 Hectares. On 14th December, 2005, the High Court granted letters of administration intestate to the appellant in Kakamega High Court Succession Cause No. 562 of 2004. On 9th November, 2006, the appellant applied for confirmation of the grant. By then *Nicholas* had died. On 6th April 2010, the Grant was confirmed and the land was distributed to the appellant and *Charles Mutsotso Likhanga*; the appellant to inherit 0.48 HA and the latter 0.39HA. The appellant and Charles Mutsotso were registered as proprietors on 13th May, 2010.

[2] On 16th May, 2011, *Ferdinand Lisutsa Shibuku* and *Mary Goreti Ingaso*, the respondents herein each lodged a caution against the title each claiming a purchaser's interest. Subsequently, the appellant filed a chamber summon in the succession cause against the respondents, seeking an order for the removal of the respective caution. Each of the respondents filed a replying affidavit and claimed to have bought a portion of that land from *Nicholas*, the appellant's deceased brother. The application was heard by oral evidence.

[3] By a judgment dated 24th September, 2015, the High Court revoked the certificate of confirmation of the Grant made to the appellant on 6th April, 2010 and ordered that:

“1. The petitioner shall file a fresh summons for confirmation of Grant issued to him on 14/12/2005 taking care that the share of his late brother Nicholas to the extent of the proved portions sold to PW1 and PW2 is hived off for the purpose of having it devolved to objectors upon payment of the balance of the purchase price if any as follows:

(i) Ferdinand Lisutsa Shibuku – 40 x 30 x 40 x 30

(ii) Josephat Isavabi Chibiya or his nominee 40 x 40

2. In this regard, therefore, and to facilitate completion of the distribution of the deceased's estate the petitioner's chamber summons dated 03/7/2013 be and is hereby allowed to the extent only of having the cautions filed by the respondents on 16th May 2011 removed."

The costs of the application shall be in the cause."

[4] The appeal is against the above judgment and decree. Two main grounds of appeal have been raised namely; that the trial judge erred in law and in fact in revoking the certificate of the confirmed Grant when there were no valid grounds to warrant such revocation; and that the court erred in law and in fact by ordering specific portions to be carved off from the estate when there was no valid sale agreement or completed sale agreement.

[5] Regarding the first ground of appeal, *Getanga* learned counsel for the appellant contends, among other things, that none of the grounds for revocation of a grant stipulated in section 76 of the Law of Succession Act (LSA) were proved; that the Grant was revoked on grounds of dishonesty; that the court is not entitled to revoke a Grant on grounds other than the ones set out in section 76 of the LSA; that the appellant intended to distribute the estate among his brothers and that the estate had not been distributed. On the other hand, *Rauto* for the respondents submitted, *inter alia*, that the appellant had misled the court and failed to disclose that his deceased brother had left behind people who had a beneficial interest to his estate; that the court should not interfere with the exercise of discretion by the trial Judge; that the court should do substantial justice, and, that procedural formalities should not be used to defeat substantial justice.

[6] By **section 76** of the **LSA**, a Grant of representation, whether or not confirmed, may at any time be revoked, if the court decides either on application by an interested party or of its own motion, that any of the grounds specified therein has been established. In this case, there was no application by the respondents for the revocation of the Grant. The application which was before the court was by the appellant, the administrator of the estate of the deceased for removal of a caution. The respondent only filed replying affidavits to the application in which each disclosed that he had bought a portion of the share of *Nicholas Lichoti Likhanga* before he died. The 1st respondent stated in the replying affidavit that the applicant secretly inherited his father's estate without his knowledge. *Josephat Isavari Chibuya* claimed that he bought a portion of the land on behalf of 2nd respondent – his daughter which was demarcated and which he fenced.

[7] After hearing the parties the High Court made a finding thus:

"There is also evidence on record to show that indeed Nicholas sold some land to PW1 and PW2. It is also clear that both PW1 and PW2 should have filed their affidavits of protest before confirmation of the grant but that notwithstanding Sections 82 and 83 of the Law of Succession Act require accountability of the petitioner to the other beneficiaries and the petitioner cannot enjoy the benefits of the estate for only himself and one other brother without remembering that Nicholas, though now dead, was also entitled to the share of the deceased's estate. In fact, the petitioner was being dishonest when he told the court on oath that he intended to share out the deceased's estate among all sons of the deceased when he knew that the estate had already been distributed."

The court also made a finding that Nicholas died but left neither a wife or children. The appellant had indicated in the application for Grant that his father and mother were not alive.

By **section 39(1) (c)** of the **LSA**, since *Nicholas* was entitled to a share of the estate but died before his share was vested in him, and since he left no wife or child and his parents pre-deceased him, his share would normally have devolved upon the petitioner and his surviving brothers and sisters.

However, if *Nicholas* had sold his share to the respondents as claimed, then the appellant as the administrator had power and duty to vest the share of *Nicholas* to the respondents. The appellant disputed the sale. He stated in his evidence that *Nicholas* had no shamba to sell because the land was still registered in this father's name. the 1st respondent stated in his evidence that the appellant told him that it was wrong for him to buy the suit property.

[8] Although the respondents did not make an application for the revocation of the Grant, the evidence gathered during the hearing of the application for removal of a caution revealed that the two respondents claimed a beneficial interest in the estate and that the confirmation of the Grant distributing the estate solely to the appellant and his brother was obtained without disclosing that the respondents claimed such an interest.

By **Rule 40(6)** as read with **Rule 40(8)** of the **Probate and Administration Rules**, any person wishing to object to the confirmation of Grant is entitled to file an affidavit of protest and to be heard on his objection. The High Court appreciated that such an affidavit should have been filed before the confirmation of the Grant. Since the appellant was aware that each respondent was claiming a purchaser's interest in respect of the share which should have devolved upon Nicholas, they should have notified the respondents of the application for the confirmation of Grant so as to give them an opportunity to prove their claim. In the circumstances, the High Court was entitled on its own motion to revoke the certificate of confirmation in order to give the respondents an opportunity to be heard.

[9] However, the High Court acted in excess of jurisdiction or beyond the pleadings when it embarked on the determination of the dispute of the alleged sale of portions of land comprising the estate without formal affidavits of protest and without giving the appellant an opportunity to respond to such affidavits. Having correctly appreciated that the respondents had not filed affidavits of protest, the court improperly converted objection to removal of a caution into an objection to confirmation of a grant and prematurely determined an application which had not yet been made. Although the High Court appreciated that the respondents had not filed affidavits of protest, it is clear from the judgment that the court could not even ascertain whether or not the full purchase price had been paid by each respondent. Furthermore, the validity of the sales was challenged which the High Court failed to determine.

[10] For the foregoing reasons, the appeal is allowed in part and we order that:

1. The appeal against that part of the judgment revoking the certificate of confirmation of the grant is dismissed and the order of the High Court affirmed.
2. The appeal against that part of the judgment directing a fresh summons for confirmation of the grant and awarding specific portions of land parcel No. Isukha/Mukhonje/2 to each of the respondents is allowed and that part of the judgment is set aside.
3. The appeal against that part of judgment ordering the cautious to be removed is allowed and the order is set aside.
4. Each respondent shall file and serve an affidavit of protest to the application for confirmation of the grant pursuant to Rule 40(6) of the probate and Administration Rules within 30 days from the date hereof.
5. The matter is remitted to the High Court to hear and determine any dispute on the confirmation of the grant in accordance with the law.
6. The costs of this appeal shall be costs in the cause and at the discretion of the High Court.

Dated and Delivered at Kisumu this 27th day of June, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR